

*a***AFFIN BANK BHD****v.****TAN SRI KISHU TIRATHRAI***b*

HIGH COURT MALAYA, KUALA LUMPUR

ABDUL MALIK ISHAK J

[CIVIL SUIT NO: D4-22-524-2001]

28 JUNE 2004

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CIVIL PROCEDURE: Execution - Stay - Fresh application by defendant to stay summary judgment obtained by plaintiff bank - Previous application for stay already rejected by registrar - No appeal therefrom to judge-in-chambers - Whether order of registrar final and conclusive - Whether fresh application possible - Res judicata and mala fides - New grounds to justify fresh application for stay, whether any - Special circumstances, whether any

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CIVIL PROCEDURE: Execution - Stay - Principles applicable - Special circumstances - Nugatoriness of appeal, whether a special circumstance in itself - Special circumstances must relate to enforcement/execution of judgment and not to merits of appeal - Irrelevance of merits of appeal in stay applications - Injury to defendant's reputation and businesses, whether a special circumstance - Whether execution of 'money judgment' would render defendant's appeal nugatory

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The plaintiff/bank obtained summary judgment against the defendant and the latter appealed to the judge-in-chambers against it. The appeal, however, was rejected. The defendant then applied for a stay of execution but the senior assistant registrar ('SAR') refused the application. Thereafter, the defendant did not appeal to the judge-in-chambers against the refusal of the SAR to grant him a stay but, instead, filed the instant (fresh) application for a stay of execution.

*g***Held (dismissing the defendant's application):***h*

[1] The defendant's instant application for a stay of execution could not be entertained because there was already an existing order by the SAR refusing his earlier application to stay the summary judgment. There was no appeal against that order of the SAR and, therefore, the said order was 'final and conclusive at this stage of the proceedings'. The defendant's instant application constituted *mala fides* as there were no new issues raised to justify the instant application. (pp 353 b-h & 354 a-d)

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- [2] The various grounds advanced by the defendant to show that its appeal to the Court of Appeal (against the refusal of the judge-in-chambers to set aside the summary judgment) would be rendered nugatory did not justify the grant of a stay. An appeal shall not operate as a stay of execution. A successful litigant, like the plaintiff, should not be delayed from reaping the fruits of its litigation. (pp 354 h & 355 a-g) a
- [3] A stay of execution may be granted if there are extraordinary or special circumstances to justify it. The special circumstances must, however, relate to the enforcement or execution of the judgment and not the merits of the appeal. That the appeal, if successful, would be rendered nugatory, is one of the grounds that can constitute special circumstances. (pp 355 h, 356 a-h, 357 a-g & 358 a-c) b
- [4] That the defendant's standing as a reputable entrepreneur would be jeopardised and/or his numerous local and international businesses brought to ruin were not special circumstances that warrant the grant of a stay of execution of the summary judgment obtained by the plaintiff. The defendant could either settle the judgment debt or contest the creditor's petition. The plaintiff would be gravely prejudiced by a stay of execution. On the other hand, the summary judgment obtained by the plaintiff was a 'money judgment' the enforcement of which would not render the defendant's appeal nugatory. (pp 358 d-g & 361 a-c) c
- [5] The defendant's contention that there were merits in his appeal could not be considered in favour of his application at all. This was because the merits of an appeal are not relevant matters for consideration in an application for a stay of execution. (*Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1 FC.) (pp 358 h & 359 a-c) d
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[Stay refused.]

Case(s) referred to:

All Persons in Occupation of the House and the Wooden Stores Erected on a Portion of Land Held Under Grant No: 26977 For Lot 4271 in the Township of Johor Bahru, Johor v. Punca Klasik Sdn Bhd [1998] 5 CLJ 49 HC (**refd**) g

Government of Malaysia v. Dato' Chong Kok Lim [1973] 2 MLJ 74 (**foli**)

Haron Mohd Zaid v. Central Securities (Holdings) Bhd [1982] CLJ 293; [1982] CLJ (Rep) 26 PC (**foli**) h

Kanawagi Seperumaniam v. Penang Port Commission [2002] 8 CLJ 503 HC (**refd**)

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC (**refd**) i

- a* *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380 CA (foll)
Re Tan Ah Poi, ex p Multi-Purpose Finance Bhd [1999] 2 CLJ 694 HC (refd)
Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal [1993] 3 CLJ 210 SC (refd)
- b* For the plaintiff - Tharmy Ramalingam (Lim Tai Ching); M/s Shook Lin & Bok
For the defendant - Shahalane Balarama; M/s Sykt KL Rekhranj
- Reported by Gan Peng Chiang

JUDGMENT

- c* **Abdul Malik Ishak J:**

Introduction

This case relates to the defendant's application for a stay of execution as seen in encl. 21A.

- d* **Brief Background**

The defendant seeks an order for a stay of execution of the summary judgment obtained against the defendant on 19 February 2002 (hereinafter referred to as "the summary judgment"). The summary judgment against the defendant is still subsisting and it is good in law. The defendant appeals to the judge in chambers against the summary judgment and the learned judge on 27 February 2003 dismissed the defendant's appeal. The defendant then seeks to obtain a stay of the summary judgment and it was heard by the learned senior assistant registrar who accordingly refused the stay on 14 June 2002 and there was no appeal against such refusal.

- f* So it can be surmised that the summary judgment is still in existence and enforceable and the stay of it was refused (the "first attempt") by the learned senior assistant registrar and there was no appeal against such refusal to the judge in chambers. As for obedience to court orders, in this case the summary judgment, the dicta of Abdul Hamid Omar LP of the Supreme Court in *Wee Choo Keong v. MBF Holdings Bhd & Anor and Another Appeal* [1993] 3 CLJ 210 must surely be the classic guideline. There his Lordship Abdul Hamid Omar LP aptly said:

- h* It is established law that a person against whom an order of court has been issued is duty bound to obey that order until it is set aside. It is not open to him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of court runs the risk of being held in contempt with all its attendant consequences.
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The defendant has no choice but to respect and obey that summary judgment. Any disobedience would land him in trouble.

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The defendant's fresh application in encl. 21A for a further stay of the summary judgment cannot be entertained because there is already an existing order of 14 June 2002 – referring to the first attempt, where the stay was refused by the learned senior assistant registrar and there was no appeal against such refusal to the judge in chambers. The first attempt sealed the fate of the defendant, once and for all.

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Now, the defendant's belated fresh attempt to obtain a stay order in encl. 21A when its first attempt had failed constitutes *mala fide*. No new issues have been raised to justify the granting of a stay now as sought for by the defendant in encl. 21A. In *Government of Malaysia v. Dato Chong Kok Lim* [1973] 2 MLJ 74, Sharma J (as he then was) aptly said at p. 76 of the report:

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The subject of the ground of attack in Enclosure 9 fully covers the subject of attack in Enclosure 33 and, therefore, in my view, the defendant is barred from reagitating the same or a part of the same matter which has already been finally adjudicated upon by Mr. Justice Chang Min Tat. The defendant did not appeal against that decision and so far as Enclosure 9 is concerned the judgment of Mr. Justice Chang Min Tat, in my view, is final and conclusive at this stage of the proceedings. The rule is that a matter which might and ought to have been made a ground of attack or defence becomes a matter which was constructively in issue. A matter which might and ought to have been made a ground of attack or defence in the former application but which was not alleged as such a ground of attack or defence is for the purposes of the plea of *res judicata* deemed to have been a matter directly and substantially in issue in the former application, that is to say, though it may not have been actually directly and substantially in issue it is still regarded as, having been constructively, directly and substantially in issue. There can be no distinction between a claim that was actually made and a claim which might and ought to have been made. The plea of *res judicata* applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and to pronounce its judgment thereupon but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time. It is only where the plea which is sought to be raised in the subsequent proceedings was not available to the party at the time of the previous proceedings that the decision cannot be constructively *res judicata*. The rule constructive *res judicata* is really a rule of estoppel. The question now raised has already been heard and finally decided. It constitutes but a part of the prayer in the former application. It was not collaterally or incidentally but directly and substantially in issue when Enclosure 9 was heard and decided. The answer to the matter is simple. The defendant's only remedy was by way of an appeal against the decision of Mr. Justice Chang Min Tat.

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- a* The matter was heard on merits and finally decided. It is not capable of readjudication by the same court in the same suit. The defendant could certainly reargue the matter before the Federal Court if the plaintiff finally succeeds in obtaining judgment and an appeal is filed against that judgment. The law, as I understand it, is that the defendant is precluded from filing a second application in respect of a matter which was directly and substantially in issue in the earlier application (Enclosure 9) in this very court. If a decision has been given with respect to a matter or part of a matter in controversy between the parties by a court of competent jurisdiction it remains binding in the subsequent stages of the same proceedings in the same court and cannot be re-opened in that court. In my view an erroneous decision irrespective of whether it is on a question of law or fact operates as *res judicata* between the parties to it. The correctness or otherwise of a judicial decision seems to have no bearing upon the question whether it operates as *res judicata* or not. Until that decision is reversed or set aside on appeal its finality and binding force remain operative on the parties.
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- c*
- d* Likewise here, the refusal of the stay on 14 June 2002 by the learned senior assistant registrar which constitutes the first attempt is considered “final and conclusive at this stage of the proceedings” since there was no appeal against the decision of the learned senior assistant registrar to the judge in chambers. Faiza Thamby Chik J in *Kanawagi s/o Seperumaniam v. Penang Port Commission* [2002] 8 CLJ 503, pp. 520-521 was of the same view when his Lordship said:
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- f* It is my observation that the defendant’s case throughout was punctured with mistake for whatever reasons, but nevertheless having disastrous effects on the defendant’s case. If the defendant did not want to reinstate the plaintiff then they should have appealed against the decision of Anuar J (as he then was) given on 18 July 1994, and not choose this forum to lodge an attack on that decision which is now final and can be given effect. Further to compound their predicament, the defendant in the assessment of damages trial did not produce any witnesses and virtually surrendered to the plaintiff. Yet the defendant did not appeal against the oral application for stay of execution made by the deputy registrar after the judge, no further application for stay can be made to the same court as the matter is *res judicata* (*Government of Malaysia v. Dato Chong Kok Lim* [1973] 2 MLJ 74).
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The Principles For A Stay

- h* It seems to me that the defendant’s counsel in order to buttress the application for a stay in encl. 21A contends that a stay should be granted as otherwise the defendant’s appeal to the Court of Appeal would be rendered nugatory. The defendant relies on the following grounds to buttress encl. 21A:
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- (a) that the defendant has filed an appeal to the Court of Appeal against the decision of the judge in chambers dated 27 February 2003 wherein the learned judge had dismissed the defendant's appeal against the summary judgment; *a*
- (b) that the plaintiff has commenced bankruptcy proceedings against the defendant and that if the stay in encl. 21A is not granted and the defendant is adjudged a bankrupt then the appeal would be rendered nugatory and the defendant cannot be compensated with costs; *b*
- (c) that the plaintiff would not be prejudiced since the stay in encl. 21A would only adjourn the enforcement of the summary judgment and so, it is said, that the plaintiff is not deprived of enjoying the fruits of its litigation; and *c*
- (d) that "interest" will continue to accumulate and be added and inevitably it will be payable by the defendant should the appeal be dismissed.

With respect, all these reasons cannot warrant the granting of the stay because if such reasons as advanced by the defendant were to be accepted by this court, then all summary judgments – just like the present case at hand, would be stayed as of right. That surely cannot be the law in this country. *d*

The general rule is this. That an appeal shall not operate as a stay of execution (*Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1, a decision of the Federal Court). *e*

In my judgment, a successful litigant like the plaintiff, who has obtained judgment in its favour cannot be delayed from reaping the fruits of its litigation. On two occasions the court has found that the defendant has not raised any matter or issue meriting a trial and that would be on: *f*

- (1) 19 February 2002 when the learned senior assistant registrar allowed the plaintiff's application to enter summary judgment; and on
- (2) 27 February 2003 when the learned judge in chambers dismissed the defendant's appeal against the summary judgment after hearing the parties. *g*

Be that as it may, the court can nevertheless grant a stay provided there exists special circumstances to justify the stay. And the special circumstances must be shown in relation to the enforcement of the judgment. In *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380, the Court of Appeal speaking through Abdul Hamid Mohamad JCA (now FCJ) aptly said at p. 403 to p. 404 of the report: *h*

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- a** The approach taken by most judges appears to be that a successful litigant should not be deprived of the fruits of a judgment obtained in his favour, unless there are special circumstances (or special grounds) that justify a stay of execution to be granted. The weight of authorities appears to me to say that the special circumstances must be special, not ordinary, common or usual circumstances and that go to the execution of the judgment and not to the validity or correctness of the judgment (or merits of the appeal). Many judges considered the question whether the appeal, if successful is rendered nugatory under the head of special circumstances. (Sometimes, the phrase used is whether the appellant, if successful, can be restored to its former position). The general view appears to be that that is the more, if not the most, important factor of all. Of course, no one ever attempts to define special circumstances, for good reasons. It is also a common view that it depends on the facts of a particular case. Thus, 'business realities' has been taken into consideration, I believe under this head. It is a common view that merits of the appeal (or correctness or validity of the judgment) is not special circumstances. Some judges do not use the term 'special circumstances'. They straight away considered whether the appeal, if successful, would be rendered nugatory. Examples are Mohamed Mustafa and Gentali (M) Sdn Bhd and the term was used 'in the sense that the appellant is deprived of the fruits of his success'. I think it does not matter whether the nugatory factor is considered under the head 'special circumstances' or not, so long as it is considered.
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- d**
- e** And in *Kosma Palm Oil Mill Sdn Bhd & Ors. v. Koperasi Serbausaha Makmur Bhd (supra)*, Augustine Paul JCA speaking for the Federal Court at pp. 16-17 of the report succinctly said:
- The onus is on the applicants to demonstrate the existence of special circumstances to justify the grant of a stay of execution. The reasons must relate to the enforcement of the judgment. They must be deposed in the affidavit filed in support of the application (see *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406). Where it is alleged that there is a danger of the unsuccessful party not being repaid if its appeal is successful for any reason like, for instance, the insolvency of the other party, this must be shown in the affidavit (see *The Annot Lyle* [1886] 11 PD 114). This issue was dealt with articulately by Abdul Malik Ishak J in *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin bin Raja Hussin & Anor* [1996] 2 CLJ 353 at p 356:
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- g**
- h** I venture to say that the applicant failed to establish by affidavit evidence that Raja Zainal Abidin is insolvent and therefore would not be in a position to reimburse RM25,892,000 and to pay damages in the event the applicant succeeds in her appeal. Unless evidence is adduced to the contrary, I must assume that Raja Zainal Abidin is not solvent and this assumption is clearly borned (*sic*) out by his affidavit in encl 45'.
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The nugatory approach as raised by the defendant forms only part of the “special circumstances” approach. But ultimately, special circumstances must still be made out in an application for a stay of execution of judgment. In *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd (supra)*, Augustine Paul JCA speaking for the Federal Court puts it nicely (see p. 16 of the report) in these erudite terms:

It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one. It is an example of special circumstances. In other words, special circumstances is the genus of which nugatoriness is a species. If it has been shown that an appeal would be rendered nugatory if stay was refused what it means is that a special circumstance has been established. Thus, they cannot be treated as separate heads and one cannot be an alternative to the other. Neither can one be accepted or rejected in favour of the other as they are inter-related.

It is also pertinent to note that the Federal Court in *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd (supra)* also adopted the Court of Appeal’s approach in *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd (supra)* (see p. 17 of *Kosma Palm Oil*’s case):

The weight of authorities appears to me to say that the special circumstances must be special, not ordinary, common or usual circumstances and that go to the execution of the judgment and not to the validity or correctness of the judgment (or merits of the appeal).

And in *Ming Ann Holdings*, the Court of Appeal held that as the winding-up petition was still pending and the applicant there still had the opportunity to contest it, there were no special circumstances shown and thus the stay was denied. At p. 407 of the report, the Court of Appeal had this to say:

It must be remembered that the judgment is a money judgment. There is not even an allegation, what more evidence, that the respondent is not in a financial position to repay the applicant if it need be. And bear in mind that the respondent is Danaharta Urus Sdn Bhd.

The grounds relied on by the appellant are nothing more than ‘fear of losing’; fear of losing business, fear of losing customers, fear of losing suppliers, fear of losing goodwill, fear of not being able to collect its debts from third parties, in case the appellant company is wound up. All that the applicant has to do to avoid such ‘fears’ is to settle the judgment debt.

a And the Court of Appeal continued to say at p. 407 of the report:

Whatever it is, those factors are not ‘special circumstances’ (if we want to use the term) nor do they show that the appeal, if successful, will be rendered nugatory (if we prefer that term). They are nothing unusual. Execution is a natural process after obtaining a judgment and winding up is one of them.

b While the Federal Court in *Kosma Palm Oil’s* case after citing favourably *Ming Ann Holdings*, aptly said at p. 18 of the report:

c It is clear that the applicants have highlighted only the problems that they will encounter if the motion is not successful. This line of reasoning militates against the rationale that a stay is granted only for reasons that relate to the enforcement of the judgment. It is not granted to give the unsuccessful party time to satisfy the judgment or to alleviate his problems.

d I think the case law is rather clear. I too have written quite a bit on stay applications. My judgments on stay can be seen in the law journals. To me, it is pointless on the part of the defendant’s counsel to submit that the status of the defendant, purportedly as a reputable businessman, would be jeopardized should the plaintiff be allowed to proceed with the execution of the summary judgment or that it would also result in the downfall of the defendant’s numerous local and overseas businesses. The indisputable fact is that no special circumstances have been shown by way of affidavit evidence by the defendant to warrant the granting of the stay of execution as per encl. 21A. Simply put, in order to avoid the enforcement of the summary judgment the defendant should settle the judgment debt forthwith. It is as easy as that. It is the law of the country. Alternatively, the defendant has still the option of contesting the creditor’s petition by attempting to have it dismissed. The defendant emphasises vigorously that the plaintiff would not be prejudiced since the plaintiff had obtained summary judgment against the defendant and that “interest” would, in any event, continue to accrue. To this I have this to say. That it is obvious that the defendant is either unwilling or unable to pay the judgment sum as seen in the summary judgment. Whatever it is, in my judgment, a stay of the summary judgment would constitute grave prejudice to the plaintiff. As I said earlier, the first attempt has sealed the fate of the defendant forever.

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Merits Of The Defence

f Going on an uphill task, the defendant claims that there are merits in the defendant’s case and the defendant states as follows:

g (a) that the plaintiff had failed in their pleadings to mention as to when the breach had taken place;

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- (b) that the plaintiff had wrongly fixed the interest rate on the overdraft; *a*
- (c) that the plaintiff had failed to state the accurate loan account number and the letter of offer in the letter of demand; and
- (d) that the summary judgment obtained is not a final judgment. *b*

Sadly, the merits of the defendant's case cannot be a relevant consideration nor can it constitute special circumstances. There is a wealth of authorities on this point but I need to cite only three of them:

- (a) *Kosma Palm Oil (supra)*; *c*
- (b) *Ming Ann Holdings (supra)*; and
- (c) *All Persons in Occupation of the house (partly wooden and partly cemented) and the Wooden Stores Erected on a Portion of Land held under Grant No: 26977 For Lot 4271 in the Township of Johor Bahru, Johor v. Punca Klasik Sdn Bhd* [1998] 5 CLJ 49. *d*

Out of deference to the defendant, I say categorically that there are no merits to the defendant's case for the following reasons:

- (a) There was a complaint that the date of the breach was not stated in the plaintiff's pleadings, but I am of the view that this point is not relevant at all. It must be borne in mind that the defendant's liability was to pay on demand as reflected in the letter of offer dated 13 May 1995 at p. 44 of exh. "ABB2" of encl. 6 and that such demand was effected on 12 February 2001 as seen in exh. "ABB4" of encl. 6. *e*
- (b) That issues pertaining to the wrong interest rate that was fixed on the overdraft and the failure of the plaintiff to state the accurate loan account number and the letter of offer in the letter of demand were, sadly, not pleaded nor raised in the defendant's defence. These issues too were not raised in the affidavits to oppose the plaintiff's application for summary judgment. Since these issues were not raised in the defendant's affidavits, the plaintiff was precluded from being given an opportunity to respond positively to these factual matters by way of an affidavit. I have no hesitation to disregard these issues forthwith and, at any rate, these issues cannot possibly form a basis to set aside the summary judgment. *f*
- (c) In regard to the argument that the summary judgment obtained is not a final judgment, I beg to disagree. The Privy Council in *Haron bin Mohd. Zaid v. Central Securities (Holdings) Berhad* [1982] CLJ 293; ([1982] CLJ (Rep) 26) p. 294 (p. 32) had this to say in regard to a final judgment: *g*
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- a* And thus the Malaysian courts treat an order of court giving leave to a plaintiff to sign final judgment as a final order, thus entitling a defendant to appeal to the Federal Court without the necessity of obtaining leave.

Continuing further, the Privy Council said at p. 294 (pp. 33-34) of the report:

- b* It appears to their Lordships that the Federal Court in *Ratnam v. Cumarasamy* [1962] MLJ 330 and *Peninsular Land Development Sdn. Bhd. v. K. Ahmad* [1970] 1 MLJ 253 and subsequently in *Hong Kim Sui v. Malayan Banking Bhd.* [1971] 1 MLJ 289, *Arumugam Pillai v. Government of Malaysia* [1980] 2 MLJ 283 and *Ng Cheng Yoon v. Mah binti Mat Isa* [1981] 1 MLJ 218,
- c* all of which are unanimous, reserved judgments, has established over the years a settled practice of applying Lord Alverstone's test in the *Bozson* case in order to determine whether an order is final or interlocutory. Their Lordships are unable to find any error in this reasoning; on the contrary their Lordships feel entitled to say that the test is both sound and convenient. In three of the
- d* five cases cited above the appeal was against leave to sign judgment in summary proceedings. Thus the effect of the practice adopted by the Federal Court in such cases is in line with the English practice as established by Statute since 1925. In any event, this being a matter of practice and procedure, their Lordships, in accordance with their practice, will uphold the decision of the Federal Court.
- e* In *Re Tan Ah Poi; ex p Multi-Purpose Finance Bhd* [1999] 2 CLJ 694, I had occasion to say as follows:
- The English Courts have dutifully applied *Salaman's* test (*White v. Brunton* [1984] QB 570). In our beautiful country, our courts have adopted *Bozson's* test. Two examples need be cited. The first is the Federal Court decision in
- f* *Tee Than Song Construction Co Ltd v. Kwong Kum Sun Glass Merchant* [1967] 2 MLJ 205, while the second is the decision of the Privy Council in *Haron bin Mohd Zaid v. Central Securities (Holdings) Bhd* [1982] 2 MLJ 94. In the circumstances, I too am minded to apply *Bozson's* test. The High Court judgment was a judgment that was decided by way of an appeal from the decision of the sessions court. It finally disposed of the rights of the parties notwithstanding that the appeal proper to the Court of Appeal was still pending. The sessions court heard the case on a full trial basis and dismissed the judgment creditor's claim against the judgment debtor. To reiterate when the High Court in Johor Bahru heard the appeal, it had decided on the rights of the parties and its judgment must therefore be construed as final
- g* notwithstanding that the appeal was still pending in the Court of Appeal. This was my judgment and I so hold accordingly.
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I say with a certain measure of certainty that the summary judgment is a money judgment and, by its very nature, any enforcement levied on such a judgment will not render the defendant's appeal nugatory. The defendant has the option to settle the judgment debt and thus pre-empting execution proceedings and in the event his appeal is successful, such monies would be refunded to him without risk of dissipation or loss bearing in mind that the plaintiff is a licensed bank. I say that the defendant is always at liberty to settle the judgment debt in order to avoid bankruptcy proceedings and the defendant is solely to blame and has to be solely responsible for his own downfall if he chooses not to pay the plaintiff. Alternatively, the defendant is at liberty to contest the creditor's petition. The defendant is certainly aware that the plaintiff has attempted, on numerous occasions, to serve the creditor's petition but to no avail. The defendant chose to avoid service of the creditor's petition on him.

Conclusion

In my judgment, the defendant has failed to establish any special circumstances to warrant a stay. I have no choice but to dismiss encl. 21A with costs.

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